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December 28, 1999

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of )  
Achernar Broadcasting Company ) MM Docket No. 86-440  
Lindsay Television ) File No. BPCT-860410KP  
For Construction Permit For a New UHF TV ) File No. BPCT-860410KQ  
Station on Channel 64 at Charlottesville, )  
Virginia )  
\_\_\_\_\_ )

To: The Commission

**SHENANDOAH VALLEY'S REPLY**

"He that digresseth from the Matter to fall upon the  
Person ought to be suppressed by the Speaker . . .  
No reviling or nipping words must be used."  
*Parliamentary debate, 1604*

The latest pleading<sup>1</sup> from the two competing applicants in this case  
("Applicants"), now merged after years of time-consuming wrangling, "digresseth from the  
Matter" at hand and by so doing distorts the issues to be resolved by the Commission.<sup>2</sup>

<sup>1</sup> Consolidated Opposition To Unlawful Filings by W19BB ("Opposition"), MM Docket No. 86-440 (filed Dec. 16, 1999.) Achernar Broadcasting Company and Lindsay Television, Inc., merged to form Charlottesville Broadcasting Company. Their Opposition is directed at the application of Shenandoah Valley Educational Television Corporation ("Shenandoah Valley") for a full-power station on Channel 19 in Charlottesville and at two other Shenandoah Valley submissions, all filed December 2, 1999 in this matter.

<sup>2</sup> Applicants characterize Shenandoah Valley's position in these matters as "abusive," "reflecting a certain arrogance," "astonishing," showing "audacity," an "outlaw filing," "the rogue Form 340 application," "a transparent effort to perpetuate its own interest at the expense of the public interest," and as calling for Shenandoah Valley to be "admonished and sanctioned."

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Applicants' mischaracterization of Shenandoah Valley's position – The premise and thrust of Applicants' Opposition are that Shenandoah Valley seeks to achieve what the status of its translator station in Charlottesville precludes, namely the continuation of its translator operations on Channel 19 in Charlottesville as a priority over Applicants' efforts to operate a full-power station on the same channel and in the same community. But it is this very mischaracterization of Shenandoah Valley's position that the filing of its application for Channel 19 was intended to dispel. Thus, the Opposition (§ 6) asserts that Shenandoah Valley's filings had "only one purpose: to delay resolution of this proceeding to permit W19BB's continued secondary use of Channel 19 in Charlottesville." It is true that the filings have only one purpose, but it is quite the opposite of Applicants' assertion. That purpose is to further Shenandoah Valley's goal to operate a full-power public station on Channel 19 in Charlottesville.

Shenandoah Valley's application is for a full-power station in Charlottesville, not a translator. Shenandoah Valley's companion pleading seeks only to argue that its full-power application should not be shut out from consideration because of the exclusive rights to Channel 19 unjustifiably about to be accorded to the Applicants by the Commission. There is neither a legal nor equitable rationale for denying Shenandoah Valley's aspirations to operate a full-power noncommercial, educational station in Charlottesville without its ever having had an opportunity to apply for it.

What are the stakes? Before we go further, let us clarify one thing – a point that Applicants have repeatedly demeaned and belittled. What is at issue here could be the survival of public television in an area where it is needed probably as much as in any region of the United

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These "reviling or nipping words" have no more place in this Commission proceeding than in the 1604 Parliament.

States, and we are not talking only about the area served by the Charlottesville translator but also the area reached by the main station service out of Staunton and Front Royal, Virginia. Nearly 40% of Shenandoah Valley's public contributions come from viewers served by the Charlottesville translator, and these contributions are a vital financial underpinning to the distant learning service to northern Appalachia provided by Shenandoah Valley's instructional and other public television programming. Further, Shenandoah Valley provides unique local programming, and in fact is the only source of local public affairs and documentary programming for the Charlottesville area. These benefits "do . . . remotely outweigh the public interest benefits of a second commercial television station" in Charlottesville. Opposition at ¶17. But more pertinently, that weighing of benefits should be undertaken by the Commission. Yet the course the Commission has proposed, at Applicants' urging, would preclude any evaluation of the comparative merits of the two operations – the Applicants' and Shenandoah Valley's proposals for a new full-power public station on Channel 19.

Defects in the application process – Applicants raise all sorts of procedural arguments against Shenandoah Valley's application. But simple answers turn them aside. Shenandoah did not previously apply for a full-power Channel 19 station in Charlottesville because Channel 19 was never previously available for full-power analog applications, presumably because it was short-spaced to DTV Channel 19 in Portsmouth, Virginia. In 1986 Shenandoah Valley did not apply for a full-power Channel 64 station because it did not have the same needs as it has today. But it certainly did not understand that by failing to file for Channel 64 in 1986 it would be precluded from filing for a new full-power station on any new channel that might subsequently be made available in Charlottesville. Yet that is the essence of Applicants' argument.

Applicants criticize Shenandoah Valley's reliance on Section 309(j) of the Communications Act of 1934 which provides for competitive bidding procedures when two or more mutually exclusive applications have been filed for an allotted channel.<sup>3</sup> It is true that the Commission may "define the circumstances under which the requisite mutual exclusivity exists." Opposition at ¶12. But that power does not entitle the Commission to define away any and all opportunity for the filing of mutually exclusive applications. Section 309's mandate of fair consideration of mutually exclusive applications has long been recognized. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). The Commission has not here lived up to that mandate.

Applicants assert that Channel 16 of Rhode Island, Inc., 31 FCC 2d 574 (1971), the only administrative decision they have been able to cite in support of their request for a channel change, provides precedent for eviscerating the competing application process in this case. See Shenandoah Valley Comments at note 15. There, the Show Cause Order assigned Channel 16, rather than the initially granted Channel 64, to a permittee in Providence, Rhode Island. But the situation here is not analogous. There, both channels had already been allotted to Providence, and the petitioner was a *permittee* (*i.e.*, it had already received a grant; and it was not a mere *applicant*, as is the situation here). The Applicants here seek a channel not yet allotted to Charlottesville and, as mere applicants, do not have a special status that elevates them above Shenandoah Valley. See, e.g., Re Atlantic Telecasting Corp., 3 FCC 2d. 392 (1966).

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<sup>3</sup> Applicants point out (Opposition at ¶13) that Section 309 does not "purport to address the procedure by which the Commission allocates broadcast channels." But Shenandoah Valley cites Section 309 for the proposition that, having opened up Channel 19 for use in a community, the Commission may not then legislate (or waive) away the right of other interested parties to compete for the new channel. Shenandoah Valley has concerns about the rule-making procedure by which Channel 19 was allotted to Charlottesville, but they are not based on Section 309.

Defects in the rule making process – Shenandoah Valley also objects to the Mass Media Bureau’s unilateral decision to bypass, uniquely in this case, the petition for rule making process that every other applicant, whose application was pending as of September 20, 1996, was required to undergo<sup>4</sup>. By virtue of this special treatment, no one will have the opportunity to show why Channel 19 should not be allotted to Charlottesville, no one will have the opportunity to comment on whether it should be a reserved or commercial allotment, and, most relevantly, no one will have the opportunity to show that a different channel should be allotted to Charlottesville.

Applicants also raise procedural objections to Shenandoah Valley’s “Supplement” – the pleading that accompanied its application. Shenandoah Valley would ordinarily have filed it after Applicants filed their petition for rule making to substitute Channel 19 for Channel 64 as a full-power allotment in Charlottesville. But that opportunity was preempted by the Mass Media Bureau’s November 22 public notice<sup>5</sup> that Applicants, unlike all other similarly-situated applicants in the reallocated 746-806 MHz band, would not be required to submit a petition for rule making. This preemptive action by the Mass Media Bureau flies in the face of its previous statement that: “all conditions pertaining to the applications and rule making petitions will continue to apply [to amendments to pending applications in the reallocated band].”<sup>6</sup>

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<sup>4</sup> Applicants defend this special treatment as “recognition of the extraordinary length of time the Charlottesville proceeding has been pending.” Opposition at ¶11. But blame for the delay cannot be attributed to Shenandoah Valley; in fact, Applicants were partially responsible for the delay. In any event, delay in the proceeding does not warrant compromising procedural rights and public policy considerations.

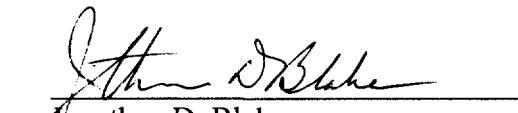
<sup>5</sup> Mass Media Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations, DA 99-2605 (released November 22, 1999) (hereinafter the “Mass Media Bureau Notice”).

<sup>6</sup> Memorandum Opinion and Order, In the Matter of Reallocation of Television Channels 60-69, the 746-806 MHz Band, ET Docket 97-157 (released October 9, 1998) at ¶11. See also

Shenandoah Valley continues to strongly oppose waiver of nearly all relevant Commission procedures in this matter.<sup>7</sup>

Shenandoah Valley respectfully requests that if Channel 19 is allotted to Charlottesville, its application for Channel 19 in Charlottesville, Virginia, be considered at the same time as Applicants' application.

Respectfully submitted,



Jonathan D. Blake  
Cara Maggioni  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20044-7566  
(202) 662-6000

*Counsel for Shenandoah Valley Educational  
Television Corporation*

December 28, 1999

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Shenandoah Valley Comments, MM Docket No. 86-440, filed July 28, 1999, at 5 (hereinafter Shenandoah Valley Comments).

<sup>7</sup> See Shenandoah Valley Comments and Shenandoah Valley Reply Comments, MM Docket No. 86-440 (filed August 19, 1999.)

CERTIFICATE OF SERVICE

I, Sarah McMeans, hereby certify that a true and correct copy of the foregoing Reply to Consolidated Opposition was this December 28, 1999, sent by first-class mail, postage prepaid to the following:

James W. Shook, Esq.  
Mass Media Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554


Christopher J. Reynolds, Esq.  
P.O. Box 2809  
Prince Frederick, Maryland 20678  
Counsel for National Radio Astronomy Observatory

Robert M. Gurss, Esq.  
Wilkes, Artis, Hedrick & Lane, Chartered  
1666 K Street, N.W., Suite 1100  
Washington, D.C. 20006  
Counsel for APCO

Ray White, Esq.  
Paramount Pictures  
Stations Group  
5202 River Road  
Bethesda, MD 20816  
Counsel for Paramount Pictures/Viacom

Gene A. Bechtel, Esq.  
Bechtel & Cole, Chartered  
Suite 260, 1901 L Street, N.W.  
Washington, D.C. 20036  
Counsel for Lindsay Television, Inc.

Katrina Renouf, Esq.  
Renouf & Polivy  
1432 Sixteenth Street, N.W.  
Washington, D.C. 20036

  
\_\_\_\_\_  
Sarah McMeans